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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. TRAVELL BROWN, Defendant and Appellant.	A151961 (Contra Costa County Super. Ct. No. 160397-6)

Defendant Travell Brown was convicted by a jury of one count of robbery, one count of assault by means likely to produce great bodily injury, and one count of battery with serious bodily injury. On appeal, he contends he was denied his constitutional right of self-representation and asserts the trial court erred by not sua sponte giving a "unanimity" instruction. We conclude defendant's constitutional right to represent himself was not abridged, reject his argument on unanimity, and affirm the convictions. However, we remand the matter for the limited purpose of allowing the trial court to exercise its discretion on two sentencing enhancements under recently amended Penal Code sections 667, subdivision (a), and 1385.

DISCUSSION

Denial of Faretta *Motion*

Relevant Facts

Prior to the preliminary hearing, defendant requested a *Marsden*[1] hearing before Judge Hiramoto, and in a closed courtroom, defendant proffered his reasons for wanting new counsel. On realizing he was not succeeding in that request, defendant asked to represent himself. Judge Hiramoto then denied defendant's *Marsden* motion, reopened the courtroom to the public, and had the following exchange in connection with defendant's *Fareta*[2] request:

> "The Court: That if you represent yourself and then later you say, oh, no, I don't want to represent myself anymore, the Court is not going to just say, oh, okay, well here's a new public defender. [¶] In other words, this is not a way to get a different public defender assigned to your case.
>
> "The Defendant: Okay. How do I get another public defender? Because I don't want her.
>
> "The Court: It's not going to happen. It's not permissible, it's not the law. Even if I granted it, the appellate court could reverse it.
>
> "The Defendant: Why is that?
>
> "The Court: Because I have to follow the law.
>
> "The Defendant: I do not want this lady. I do not want this lady. I do not want her."

At that juncture, Judge Hiramoto gave defendant an "Advisement and Waiver of Right to Counsel" form and time to fill it out while the court heard other matters. Judge Hiramoto subsequently recalled defendant's case to conduct a *Faretta* hearing and continued the earlier colloquy:

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[1] *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

[2] *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).

"Court: Okay. So are you willing to accept the consequences of the worst possible result if you choose to go and represent yourself?

"Defendant: Yes.

"Court: Okay. Do you think that you would have a better chance of success with a lawyer?

"Defendant: Not with this lawyer; but probably so, yes.

"Court: Okay. So you're not saying that you don't want a lawyer at all?

"Defendant: I've never said that.

"Court: That's what I understood you to believe earlier.

"Defendant: I understand I don't want this—this lawyer.

"Court: Okay. And I'm going to ask that you not do that. Don't face her and make a statement like that.

"Defendant: I'm saying –

"Court: I know what you mean.

"Defendant: I do not want her as my attorney.

"Court: I understand that. Okay? So let me tell you this, I have denied the *Marsden* motion. That means I have denied the request to have a different lawyer represent you other than [defense counsel].

"Defendant: Yes, ma'am.

"Court: So understanding that that is already a ruling, that's already my order—

"Defendant: Yes, ma'am.

"Court: At this time are you seeking to represent yourself without any lawyer at all?

"Defendant: No.

"Court: Okay. With that, I do not believe there has been a clear and unequivocal request for SLO status—I mean, SLA status. So at this time I am leaving the PX on for February 25th at 1:30.

"[Deputy District Attorney]: Thank you.

"[Defense Counsel]: Thank you.

"Defendant: You bitch. You bitch.

"Court: That's contempt of court and I need him removed right now.

"Defendant: I hate her. I hate her. I don't care. I hate her."

About a month later, at the arraignment on the information, defendant appeared before Judge Scanlon and, at the outset, the following colloquy took place:

"[Defense Counsel]: So Mr. Brown would like to address the court. I do not know the nature of his request.

"Court: All right. Well, I notice that once before he made a *Faretta* motion that was denied, so I—what subject are you wishing to address the court on?

"Defendant: I would like to address that subject again because—

"Court: No. No, because you haven't even been able to maintain yourself in court—

"Defendant: Can I go back, please?

"Court: —before the case was called. I could not find you able to represent yourself when you cannot maintain decorum. So I will adopt the recent finding by Judge Hiramoto on February 22nd, 2016 and—at which time she had denied the *Faretta* motion. [¶] So, [defense counsel], are you prepared to enter a plea?

"Defendant: She can't do nothing on my behalf. I refuse to allow her to do anything on my behalf. I don't want her on my case. I refuse to allow her to say anything on my behalf.

"Court: Then you can have a *Marsden* hearing if that's what you're requesting.

"Defendant: Yeah, can I have one of them . . . 'cuz I don't want her on my case. I explained this to people before, but nobody want to listen to me.

"Court: That's because you don't seem to want to listen to anybody. So just be quiet for a moment and we will have the *Marsden* hearing.

"Defendant: All right. Thank you.

"Court: I need to clear the courtroom of everybody but court staff and [defense counsel]."

On re-opening the courtroom following the *Marsden* hearing, the following exchange occurred:

"Court: Take him out of the courtroom.

"Defendant: Thank you. [¶] Bitch.

"Court: Get back in here, sir.

"Defendant: Fuck.

"Court: Sir—

"Defendant: Stupid.

"Court: —you apologize to the court.

"Defendant: I'm not apologizing to the court. Said that to my attorney. Fuck her.

"Court: Take him out.

"Defendant: Bitch." (Whereupon defendant was removed from the courtroom.)

Seven months later, at a pretrial hearing three weeks before trial commenced, defendant continued to rail about his attorney. At this point, defense counsel asked the court (Judge Flinn, presiding) to hold a third *Marsden* motion, which it did. Following a closed hearing, that motion was also denied.

Relevant Law

Defendant maintains Judge Scanlon erred in denying his second request to represent himself by (a) not holding a hearing and (b) failing to place sufficient facts on the record to support denial of the motion.

The legal principles relevant to *Faretta* motions are well established. A criminal defendant has a constitutional right of self-representation. (*Faretta, supra,* 422 U.S. at pp. 835–836.) To invoke that right, a defendant must unequivocally assert it, within a reasonable time prior to the commencement of trial. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) " '[T]he *Faretta* right is forfeited unless the defendant " 'articulately and unmistakably' " demands to proceed in propria persona.' " (*People v. Williams* (2013) 58 Cal.4th 197, 254 (*Williams*); *People v. Marshall* (1997) 15 Cal.4th 1, 21 (*Marshall*) [demand for self-representation must be both articulate and unmistakable].) Courts must also "indulge every reasonable inference *against* waiver of the right to counsel." (*Id.* at

p. 20, italics added.) "[W]hen a motion to proceed pro se is timely interposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be." (*People v. Windham* (1977) 19 Cal.3d 121, 128, italics omitted.)

To determine whether a defendant has unequivocally asked to represent him or herself, a court "should evaluate not only whether the defendant has stated the motion clearly, but also the defendant's conduct and other words." (*Marshall*, *supra*, 15 Cal.4th at p. 23.) "A motion for self-representation made in passing anger or frustration, an ambivalent motion, or one made . . . [to] delay or to frustrate the orderly administration of justice may be denied." (*Ibid*.) In addition, a defendant's invocation of the right of self-representation is not considered unequivocal when motivated simply by dissatisfaction with the defendant's current attorney. (*People v. Lopez* (1981) 116 Cal.App.3d 882, 889–890.)

If the defendant unequivocally asks to represent himself, a court may deny such request when his "conduct . . . gives the trial court a reasonable basis for believing that his self-representation will create disruption." (*People v. Welch* (1999) 20 Cal.4th 701, 734 (*Welch*).) "This rule is obviously critical to the viable functioning of the courtroom. A constantly disruptive defendant who represents himself, and who therefore cannot be removed from the trial proceedings as a sanction against disruption, would have the capacity to bring his trial to a standstill." (*Ibid.*) "[A] trial court must undertake the task of deciding whether a defendant is and will remain so disruptive, obstreperous, disobedient, disrespectful or obstructionist in his or her actions or words as to preclude the exercise of the right to self-representation. The trial court possesses much discretion when it comes to terminating a defendant's right to self-representation and the exercise of that discretion 'will not be disturbed in the absence of a strong showing of clear abuse.' " (*Id.* at p. 735.) A record on appeal is often "cold," and it is "the trial court . . . that . . . is in the best position to judge defendant's demeanor." (*Ibid*.)

Upon review, we must affirm the trial court's ruling if the record as a whole establishes defendant's request was properly denied on any ground. (*People v. Dent* (2003) 30 Cal.4th 213, 218 (*Dent*).)

We initially observe that we are hard pressed to conclude that, before Judge Scanlon, defendant " ' "articulately and unmistakably" ' " demanded to represent himself. (*Williams, supra*, 58 Cal.4th at p. 254.) All defendant said to the court was that he "would like to address that subject again"—which could as easily have been understood to be an effort to continue arguing over Judge Hiramoto's prior ruling, as it could have been understood to be a new *Faretta* request before a new judge. The entirety of the record quoted above also indicates defendant was angry and upset with his appointed attorney and his principle concern was to obtain new counsel. (See *Marshall, supra*, 15 Cal.4th at p. 23.)

Even assuming defendant made a legally adequate *Faretta* motion in front of Judge Scanlon, the record reflects that the court denied the motion on the basis of defendant's disruptive conduct. Defendant does not dispute that a *Faretta* motion can properly be denied where the defendant has engaged in "disruptive, obstreperous, disobedient, disrespectful or obstructionist" conduct. (*Welch, supra*, 20 Cal.4th at p. 735.) Rather, he contends the trial court failed to make a sufficiently detailed record as to his disruptive behavior. The record, however, adequately supports Judge Scanlon's implicit finding that defendant's behavior was sufficiently disruptive to warrant refusing a request to represent himself. Defendant was disruptive before the pretrial conference even started. Then, as the court was specifically pointing this out on the record, defendant interrupted again. And when the court went back on the record after holding a second *Marsden* hearing, the very first thing it did was to order defendant removed from the courtroom, evidencing continued "disruptive, obstreperous, disobedient, disrespectful or obstructionist" conduct during the closed hearing. In sum, the record adequately

supports the trial court's denial of defendant's second *Faretta* motion on the ground he would be unable to "maintain decorum" during trial.[3]

At oral argument, defendant placed heavy emphasis on *Dent*, in which the Supreme Court concluded the trial court had abused its discretion in denying a *Faretta* motion. The high court first explained that the defendant's alternative request, if his *Marsden* motion was denied, to represent himself, sufficiently invoked his right of self-representation. And even if it was equivocal, the trial court had treated the alternative request as sufficient under *Faretta*. (*Dent, supra,* 30 Cal.4th at pp. 218–221.) The more fundamental problem, said the court, was that the trial court denied the *Faretta* request for an *improper legal reason*—because it was a death penalty murder trial. (*Id.* at pp. 218, 222 ["it is apparent the trial court denied the self-representation request because of the court's erroneous understanding of the law].) The court also concluded the record did not support any other permissible bases for the denial of the motion. (*Id.* at p. 222.) The record here is readily distinguishable. As we have discussed, the trial court did not deny defendant's *Faretta* request for a legally impermissible reason; rather, it denied it on the basis of defendant's disruptive conduct. The record also supports the trial court's assessment of defendant's conduct. Accordingly, the trial court did not, in this case, abuse its discretion in refusing to allow defendant to proceed in propria persona.

Failure to Give Unanimity Instruction

Relevant Facts

On a winter evening in January 2016, the victim walked into a small, neighborhood market to purchase alcohol. He was a regular customer and spoke limited English. Two other men were in the market when the victim entered—a Hispanic man and a bald African-American man wearing a distinctive blue sweater. The store clerk

[3] That the trial court said it "will adopt" the "recent finding" by Judge Hiramoto is perhaps not the most appropriate phraseology. But there can be no doubt as to the reason Judge Scanlon denied defendant's second *Faretta* request and, as we have discussed, the record adequately supports that reason.

later identified defendant as the African-American man because he had previously seen him at the market and had told him to stay away.

The victim purchased alcohol and pocketed the change. As he exited the market, defendant hit him, causing him to fall to the ground. Although the clerk did not see the incident, he heard scuffling near the exit "like a slap or hitting" and someone saying " '[g]o to sleep' " and " '[g]ive me the money.' " The victim protested he did not have any money. The clerk, in turn, walked to the door and saw the victim and defendant. At that point, the victim's face was uninjured. The clerk returned to the counter and called law enforcement. Officers arrived within 10 minutes.

Meanwhile, the victim tried to walk away from defendant, but defendant followed. When the victim again refused to give defendant money, defendant punched him in the mouth, knocking him to the ground. While the victim lay on the ground with a split lip and contusion on his head, defendant took his cash, cellular phone, and keys.

The victim managed to return to the market, where an officer, on seeing him enter on the surveillance screen, went over and talked to him. The victim was subsequently taken to a hospital, where he received stitches in his lips and stayed overnight due to his head injuries. His face was still swollen a month later, and the back of his head still bore a lump several months later at trial.

Relevant Law

Defendant claims the trial court should have sua sponte given a "unanimity" jury instruction because "there were clearly two acts that could have been the basis for all three counts: one at the front of the store and one around the corner from the store."

"A criminal defendant is entitled to a verdict in which all 12 jurors concur as a matter of due process under the state and federal Constitutions." (*People v. Arevalo-Iraheta* (2011) 193 Cal.App.4th 1574, 1588.) Accordingly, in any case where the evidence would permit jurors to find the defendant guilty of a crime based on two or more discrete acts, either the prosecutor must elect among the alternatives or the court must require the jury to agree on the same criminal act. (*Id*. at pp. 1588–1589; see *People v. Russo* (2001) 25 Cal.4th 1124, 1132–1133.) Thus, where it is warranted, the

court must give a unanimity instruction sua sponte. (*People v. Riel* (2000) 22 Cal.4th 1153, 1199.) The omission of such instruction is reversible error if, without it, some jurors may have believed the defendant guilty based on one act, while others may have believed him guilty based on the other. (*Arevalo-Iraheta*, at p. 1589.)

The rule requiring a unanimity instruction, however, has several exceptions, including " 'when the acts are so closely connected in time as to form part of one transaction.' " (*People v. Jennings* (2010) 50 Cal.4th 616, 679 (*Jennings*).) This is often referred to as the "continuous course of conduct" exception. (See, e.g., *People v. Gunn* (1987) 197 Cal.App.3d 408, 412–413.) Two cases well illustrate this exception as it pertains to robberies: *People v. Haynes* (1998) 61 Cal.App.4th 1282 (*Haynes*) and *People v. Williams* (2013) 56 Cal.4th 630 (*Williams*).

In *Haynes*, the victim was robbed of cash during two consecutive encounters. (*Haynes*, *supra*, 61 Cal.App.4th at p. 1826.) During the first, an unidentified assailant snatched some of the cash the victim was holding while he was sitting in his parked car with the front window open. (*Ibid*.) The victim managed to drive out of the parking lot, but with the robber, who had forced his way into the front passenger seat. (*Ibid.*) The assailant then forced the victim to stop and give him the remainder of the cash. (*Ibid.*) After the assailant exited the car, the defendant picked him up, and the two drove away. (*Ibid.*) The Court of Appeal rejected the defendant's claim of unanimity error, explaining the two seizures of the victim's cash were part of a continuing course of conduct because they were "just minutes and blocks apart and involved the same property . . . [and] part of a single objective of getting all the victim's cash." (*Id.* at p. 1296.)

Similarly, in *Williams*, the appellate court considered and rejected the defendant's argument that "the trial court erred by failing to instruct the jury that it must unanimously decide which robbery offense—the completed robbery of the wallets or the attempted robbery of the cocaine—supported" a special-circumstance felony-murder allegation. (*Williams*, *supra*, 56 Cal.4th at p. 682.) In that case, the defendant set up a drug deal at a locale he had frequented, with the intent of robbing the dealer. (*Id.* at pp. 639–640.) When two drug dealers arrived, the defendant and his accomplices first took their wallets

and then told one of the dealers to call his associates and confirm he had received the money for the cocaine. (*Id.* at p. 640.) When the call did not initially connect, the defendant snatched the phone to redial the number and, while doing so, accidentally shot one of the dealers in the chest. (*Ibid.*) The defendant then shot the other dealer, who had witnessed the first shooting. (*Ibid.*) The Court of Appeal concluded no unanimity instruction was required because taking the wallets and the attempted theft of the cocaine " 'took place within a very small window of time.' " (*Id.* at p. 682, quoting *People v. Benavides* (2005) 35 Cal.4th 69, 98.)

Analysis

As in *Hayes* and *Williams*, the "two acts" defendant has identified occurred within a very short period of time and in roughly the same location. Defendant first demanded money from and hit the victim as the victim left the market, and defendant only ceased his demands because the clerk appeared. As the victim walked away from the store, defendant followed, and within a very short time, again hit the victim and this time seriously injured the victim's face and head and succeeded in stealing his cash, cell phone, and keys. To borrow from *Haynes*, the initial encounter at the door of the market and the later encounter down the block are " 'so closely connected as to form part of one transaction.' " (*Haynes*, *supra*, 61 Cal.App.4th at p. 1295, quoting *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.)

Moreover, a unanimity instruction is not required where, as here, the defendant offers the same defense to the assertedly different acts constituting the charged crime, so no juror could have believed he committed one act but disbelieved he committed the other. (See *People v. Schultz* (1987) 192 Cal.App.3d 535, 539–540.) Defense's explanation as to the initial encounter in the doorway of the market and the second down the block were the same—he was present but did not hit or rob the victim. Thus, defense counsel acknowledged defendant was present at the market, but pointed out he frequently loitered outside the store and was not doing anything unusual or sinister the night of the crimes. Counsel also conceded defendant had walked down the street towards where the

second encounter occurred, but maintained the mere fact he was present did not mean he struck the victim and robbed him.

In short, the acts in the doorway of the market and just down the block were so close in time and so close in proximity, the trial court was not required to give a unanimity instruction.

Harmless Error

Even assuming the trial court erred in failing to give a unanimity instruction, any such error was harmless.

"In determining whether any error was harmless, we ' "conduct a thorough examination of the record. If, at the end of that examination, [we] cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error—for example, where the defendant contested the omitted element and raised evidence sufficient to support a contrary finding—it should not find the error harmless." [Citation.] On the other hand, instructional error is harmless "where a reviewing court concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence." [Citations.]' [Citation.] Our task is to review 'the trial evidence to determine "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element. . . ." ' " (*People v. Odom* (2016) 244 Cal.App.4th 237, 257, quoting *People v. Gonzalez* (2012) 54 Cal.4th 643, 666.)

"The erroneous failure to give a unanimity instruction is harmless if disagreement among the jurors concerning the different specific acts proved is not reasonably possible." (*People v. Napoles* (2002) 104 Cal.App.4th 108, 119 & fn. 8 [split in authority whether such error is reviewed under *Chapman v. California* (1967) 386 U.S. 18, 24, or, *People v. Watson* (1956) 46 Cal.2d 818, 836, standard of prejudice; error harmless under either standard].) Further, "[w]here the record indicates the jury resolved the basic credibility dispute against the defendant and therefore would have convicted him of any of the various offenses shown by the evidence, the failure to give the unanimity instruction is harmless." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 853.)

Here, the jury could not have convicted defendant of battery with serious bodily injury unless it found he was involved in the second encounter, where the victim sustained serious injuries to his face and was relieved of his cash, cell phone and keys. The victim had no injuries after the initial encounter and as he started down the block to escape defendant. Thus, the jury necessarily found defendant was involved in the second encounter. Accordingly, under any prejudice standard, any supposed error in failing to give a unanimity instruction was harmless.

Senate Bill No. 1393 (2017–2018 Reg. Sess.)

Pursuant to former Penal Code sections 667, subdivision (a), and 1385, as amended (Stats. 2018, ch. 1015, §§ 1 & 2), the trial court imposed two mandatory, consecutive five-year terms for two prior serious felony convictions.

On September 30, 2018, the Governor signed Senate Bill No. 1393 (2017–2018 Reg. Sess.), which amends Penal Code sections 667, subdivision (a), and 1385, to allow a sentencing court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes, effective January 1, 2019. Because defendant's conviction will not be final by the effective date of these amendments, defendant maintains he is entitled to a remand to allow the trial court to exercise its newly conferred discretion.

The People contend defendant's request for resentencing under Senate Bill No. 1393 (2017–2018 Reg. Sess.) is not "ripe" because the new law does not go into effect until January 1, 2019. Otherwise, the People concede that "[i]f [Senate Bill No.] 1393 goes into effect before [defendant's] judgment becomes final, . . . then [the People] agree[] the new law would apply to him retroactively." The People also acknowledge that "[defendant's] conviction [will] not become final until after January 1, 2019, as finality includes that 90-day period in which appellant could seek certiorari in the United States Supreme Court should this Court affirm and the California Supreme Court deny review."

We need not consider the Attorney General's "ripeness" concern, as the effective date of the new legislation has now passed. We therefore reverse the sentence and

remand for a new sentencing hearing so the court can exercise its discretion in connection with the enhancements.

DISPOSITION

The matter is remanded to the trial court with directions to consider, after January 1, 2019, whether, under Penal Code sections 667 and 1385, as amended by Senate Bill No. 1393 (2017–2018 Reg. Sess.) sections 1 and 2 (eff. Jan. 1, 2019), to strike the enhancements imposed and, if the court decides to do so, to resentence defendant accordingly. In all other respects, the judgment is affirmed.

_____
Banke, J.

We concur:

_____
Humes, P.J.

_____
Kelly, J.*

*Judge of the Superior Court of California, County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

A151961, *People v. Brown*